

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 28Sep2001

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In the Matter of :

MARGARET WRISTON, widow of :
HUBERT L. WRISTON, (dec.), :
Claimant, :

v. :

MILBURN COLLIERY COMPANY :
Employer, :

and :

DIRECTOR, OFFICE OF WORKERS' :
COMPENSATION PROGRAMS :
Party-in-Interest. :

.....
Bobby S. Belcher, Jr., Esq.
For the Claimant

Mary Rich Maloy, Esq.
For the Employer

BEFORE: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

Statement of the Case

This proceeding involves a survivor's claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. §901 *et seq.* (hereinafter "the Act") and regulations promulgated thereunder.¹ The

¹ All applicable regulations which are cited are included in Title 20 of the Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Director's Exhibits are denoted as "DX-" and Employer's

Act and regulations provide compensation and other benefits to coal miners who are totally disabled due to pneumoconiosis and their dependents. The Act and regulations define pneumoconiosis ("black lung disease" or "coal workers' pneumoconiosis") as a chronic dust disease of the lungs and its sequela, including respiratory and pulmonary impairments arising out of coal mine employment, including any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. § 718.201.

The miner's claim was originally filed with the Social Security Administration on August 27, 1970 (DX 20-27). It was denied by that agency on April 30, 1971, May 1, 1972, and August 24, 1973. Thereafter, the miner filed a claim with the Department of Labor on November 25, 1980 (DX 20-1). It was denied by claims examiners on June 26, 1981 and March 6, 1992 (DX 20-20; DX 20-21). After requesting a hearing on May 1, 1992, the miner's claim was referred to the Office of Administrative Law Judges on July 21, 1992 (DX 20-22; DX 20-28). However, the miner wrote a letter on September 12, 1992, expressing his wish to withdraw his claim (DX 20-25). Judge Gerald M. Tierney issued an Order Allowing Withdrawal of Claim on October 7, 1992 (DX 20-27)².

The miner died on March 31, 1998, and Claimant filed a survivor's claim on August 6, 1999 (DX 1). It was denied by a claims examiner on January 8, 2000, and Claimant appealed the denial on January 12, 2000 (DX 12; DX 15). The claim was referred to the Office of Administrative Law Judges on April 18, 2000 (DX 21). Both Claimant and Employer agreed to submit the claim for a decision on the record. Accordingly, pursuant to my order dated August 31, 2000, the hearing was canceled and the parties were given until September 19, 2000 to submit deposition transcripts, and October 20, 2000 to submit closing arguments.

Director's Exhibits one (1) through twenty-two (22) and Employer's Exhibits one (1) through six (6) are now received into evidence. Employer's exhibit one is the report and curriculum vitae of Dr. Richard L. Naeye. Employer's exhibit two is the report and curriculum vitae of Dr. P. Raphael Caffrey. Employer's exhibit three is the report and curriculum vitae of Dr. Stephen T. Bush. Employer's exhibit four is the report and curriculum vitae of Dr. Gregory J. Fino. Employer's exhibit five is the report and curriculum vitae of Dr. James R. Castle. Employer's exhibit six is the report and curriculum vitae of Dr. Erica C. Crouch.

Subsequently, pursuant to the order of this tribunal dated February 27, 2001, the Director and Employer briefed the issues of whether the amendments of the regulatory provisions at §§718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 718.205(c)(5), and 718.205(d) would affect the outcome of this claim. In accordance with Judge Sullivan's opinion in *Nat'l Mining Ass'n v. Chao*, No. 00-CV03086 (D.D.C., Aug 9, 2001, this tribunal finds that they do not. The findings and conclusions that follow are

Exhibits are denoted "EX-."

² For unknown reasons, the numbering of DX 20 contains two exhibits labeled "DX 20-27."

based upon an analysis of the entire record, together with applicable statutes, regulations and case law, in relation to those issues which remain in substantial dispute. Because the miner was last employed in the state of West Virginia, the law of the United States Court of Appeals for the Fourth Circuit controls. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*). Since Claimant filed this application for benefits after March 31, 1980, Part 718 applies.

ISSUES

Because the hearing was cancelled, the parties have not narrowed the issues. Thus, the issues listed on the Form CM-1025 are:

1. Whether the widow's claim was timely filed?
2. How much coal mine employment has been established?
3. Whether the miner had coal workers' pneumoconiosis?
4. Whether the pneumoconiosis arose out of coal mine employment?
5. Whether the miner's death was due to pneumoconiosis?
6. Whether Claimant is an eligible survivor of the miner?
7. Whether the named employer is the responsible operator?

FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS OF LAW

Background, Timeliness, and Eligible Survivor

The miner, Hubert L. Wriston, was born September 28, 1923 and had an eighth grade education (DX 20-1). He married Claimant on June 7, 1943, and there is no indication that she has remarried (DX 7). A Claimant who is the surviving spouse of a miner is eligible for benefits if she is not married and was dependent on the miner. §725.212(a). As long as Claimant was married to and living with the miner at the time of his death, she is considered to have been dependent upon him. §725.215(a). There is no indication that Claimant was not married to the miner or living with him at the time of his death on March 31, 1998. Thus, I find that she was married to and dependent upon him and is his eligible survivor. Section 725.308(a) provides that "[t]here is no time limit on the filing of a claim by the survivor of a miner." Thus, the claim is timely.

Length of Coal Mine Employment

The miner alleged twenty years of coal mine employment on his 1980 claim form (DX 20-1). On his Employment History form, the miner listed Kingston/Pocahontas Coal Company, for whom he worked as a general laborer from April 1942 to October 1947; Semet-Solvay Coal Company, also known as Allied Chemical Company, for whom he worked from October 1947 to January 1954 as a general laborer; and Milburn Colliery Coal Company, for whom he worked as a mainline motor operator from June 1973 to July 1980 (DX 20-2). This amounts to eighteen years and ten months of such employment.

The Social Security records verify five years of coal mine employment with Kingston/Pocahontas Coal Company from 1942 to 1947; six and one-quarter non-overlapping years of coal mine employment with Allied Chemical Company from 1947 to 1954; and four years of coal mine employment with Milburn from 1973 to 1977 (DX 20-3; DX 4). A letter from Semet-Solvay states that the miner was employed by it from April 6, 1942 to November 30, 1950 and again from December 16, 1950 to January 30, 1954, for a total of eleven years and eight months (DX 6). A letter from Milburn verifies seven years and one month of employment with it from June 1, 1973 to July 22, 1980 (DX 5).

Based on a review of the evidence, this tribunal credits the miner with five years of coal mine employment with Kingston/Pocahontas Coal Company based on the employment history form as verified by the Social Security records; six years and three months of coal mine employment with Semet-Solvay/Allied based on the employment history form as verified by the Social Security records; and seven years and one month of coal mine employment with Milburn Colliery Coal Company, based on the employment history form as corroborated by the letter from Milburn and the Social Security records, which ended three years before the miner ended his employment with Milburn. Despite the letter from Semet-Solvay that it employed the miner for over eleven years, this tribunal finds the miner's completion of the employment history form and the Social Security records more probative. Thus, the Claimant has established that the miner worked eighteen years and four months in coal mine employment. This tribunal also finds that Milburn Colliery Company is the properly designated responsible operator by whom the miner was most recently employed as a coal miner for more than one year.

Medical Evidence

Chest X-ray Evidence³

<u>Exh. No.</u>	<u>Date of X-ray</u>	<u>Date of Report</u>	<u>Physician/ Qualifications</u>	<u>Diagnosis</u>
DX 20-27	2/21/71	4/17/72	Illegible	0/0
DX 20-13	5/19/81	5/22/81	Daniel/B	0/0
DX 20-12	5/19/81	7/13/81	Wheeler/B, R	0/-

³ The following abbreviations are used in describing the qualifications of the physicians: B = B-Reader and R = Board-Certified Radiologist. Although the credentials of all these physicians are not in the record, judicial notice of their qualifications is taken in accordance with www.ABMS.org and the 2000 NIOSH B-reader list. See *Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

<u>Exh. No.</u>	<u>Date of X-ray</u>	<u>Date of Report</u>	<u>Physician/ Qualifications</u>	<u>Diagnosis</u>
DX 20-33	12/31/90	1/1/91	Dehgan	Clear lungs
<u>Exh. No.</u>	<u>Date of X-ray</u>	<u>Date of Report</u>	<u>Physician/ Qualifications</u>	<u>Diagnosis</u>
DX 20-29	12/30/91	12/30/91	Speiden/B,R	0/1; q/p; 6 zones
DX 20-20	12/30/91	2/15/92	Cole/B,R	Completely negative
DX 20-31	12/30/91	8/3/92	Spitz/B,R	No evidence of coal workers' pneumoconiosis
DX 20-32	12/30/91	8/9/92	Wiot/B,R	No evidence of coal workers' pneumoconiosis
DX 20-29	12/30/91	7/24/92	Shipley/B,R	No evidence of coal workers' pneumoconiosis
DX 11	1/18/96	1/18/96	Lee/B,R	Clear lungs
DX 11	9/17/96	9/17/96	Lee/B,R	Chronic bronchitis
DX 11	12/5/97	12/5/97	Lee/B,R	Some irregular pneumonic infiltrations in the right lower lobe anteriorly; changes due to some chronic bronchitis and slight pulmonary emphysema; may be some minimal black lung
DX 11	2/2/98	2/2/98	Lee/B,R,	Irregular pneumonic infiltrations are noted in the right lower lobe

Medical Reports/Opinions

Dr. Ida Z. Villanueva examined the miner on May 19, 1981 (DX 20-10). Based on a medical history, a history of smoking one pack of cigarettes a day for ten years, ending in 1961, symptomatology, an x-ray, a pulmonary function study, an EKG, a blood gas study, and a physical examination, she diagnosed bronchitis unrelated to coal mine dust exposure. She did not find pneumoconiosis because of the x-ray evidence and the pulmonary studies which showed no significant pulmonary dysfunction.

Dr. D. L. Rasmussen examined the miner on May 30, 1981 (DX 20-29). He considered the miner's symptoms, performed a physical examination, relied on a twenty-year history of coal mine employment, lastly as a mainline motorman, a history of never having smoked, and reviewed the results of an x-ray, EKG, ventilatory studies, and blood gas studies. He found x-ray changes suggestive, but not diagnostic, of pneumoconiosis. He could not exclude pneumoconiosis but noted no measurable loss of respiratory function.

Dr. Rasmussen provided a letter dated July 17, 1992, stating that based on his examination and tests performed on December 30, 1991, he felt the miner did not have any respiratory impairment (DX 20-29). He believed the miner had the respiratory capacity to perform his last coal mining job as a motorman and trackman.

The record contains miscellaneous medical records from Plateau Medical Center from October 29, 1990 to January 17, 1991 (DX 20-33). These records make no mention of pneumoconiosis, but do reveal that the miner suffered from hypertension and a congenitally small right kidney.

The record contains office notes from the Fayette Clinic in Lochgelly, West Virginia, from January 12, 1994 through February 2, 1998 (DX 11). These records reveal that the miner had his gallbladder removed and suffered from diverticulitis, sinusitis, hypertension, arthritis, bronchitis, prostatitis, and abdominal pain. Although the miner presented with shortness of breath on February 2, 1998, and a mass was found in the upper right lobe, along with pneumonia, no mention of pneumoconiosis was made.

The record contains the office records of Dr. Charles Porterfield from February 1998 (DX 10). On February 2, 1998, he considered a history of not having smoked for thirty years, complaints of burning in the chest, a medical history, an x-ray, a pulmonary function study, and a physical examination. He diagnosed right upper lobe rounded infiltrate which he thought was probably pneumonia. On February 4, 1998, Dr. Porterfield again examined the miner. He considered a medical history, symptomatology, a history of never having smoked, twenty years of coal mine employment, a blood gas study, and a physical examination. Dr. Porterfield diagnosed right lower lobe pneumonia and a mass seen in the right upper lobe of the lung. Because of this mass, the miner underwent a CT scan and a needle-guided biopsy on February 5, 1998. Dr. Porterfield felt the CT scan showed 9-cm. and 4.5-cm. masses representing metastatic malignancies unless proven otherwise. He found no evidence of pneumothorax or pleural effusions. Dr. S. Gerald Koh examined the biopsy sample and diagnosed bronchogenic carcinoma, non-small cell type,

consistent with poorly differentiated carcinoma.

Dr. Carl S. Larson attended the miner between February 5, 1998 and February 16, 1998 (DX 9). He considered a medical history, the results of the CT scan and biopsy, a chest x-ray, a pulmonary function study, a blood gas study, other laboratory work, and a physical examination. Dr. Larson diagnosed hypercalcemia due to either malignancy or hyperparathyroidism and non-small cell carcinoma of the right upper lobe. Dr. Larson also attended the miner during a hospital stay from February 26, 1998 to March 5, 1998. During that time, he considered a blood gas study, other lab work results, and a physical examination. His final diagnoses were: (1) severe electrolyte imbalance and hypokalemia secondary to diuretic therapy for hypercalcemia; (2) hypercalcemia; (3) non-small cell carcinoma of the right upper lobe of the lung; and (4) chronic obstructive pulmonary disease. Dr. Larson saw the miner again on March 10, 1998, at which time he noted complaints of mid chest pain upon swallowing and failure to eat for four days, a medical history, his recent hospital courses, twenty years of coal mine employment, a history of not smoking, and considered the results of a physical examination. Dr. Larson diagnosed oral candidiasis, dehydration, non-small cell carcinoma, and hypercalcemia.

The miner died on March 31, 1998 (DX 8). The cause of death was listed as respiratory failure due to non-small cell lung cancer, pulmonary embolism, pneumonitis, and chronic obstructive lung disease. Dr. Larson, who completed the death certificate, also listed hypercalcemia, malignant versus hyperparathyroid, as another significant condition contributing to death but not resulting in the underlying cause of death.

Dr. Richard L. Naeye reviewed medical evidence on April 13, 2000 (EX 1). He considered 18.8 years of coal mine employment, mainly on a conveyer and cutting machine, but lastly as a motorman, a thirty to forty pack-year smoking history before quitting in 1961, a medical history, and the records from Plateau Medical Center, Southern West Virginia Clinic, Columbia-Raleigh General Hospital, Raleigh Cancer Center, and Drs. Rasmussen, Wiot, Porterfield, and Larson. Dr. Naeye also reviewed one glass slide containing fourteen tiny pieces of right lung tissue from the needle-guided biopsy. He found a few spots of adenocarcinoma but no evidence of pneumoconiosis. Because he did not find pneumoconiosis present, he opined that it could not have hastened the miner's death. Dr. Naeye averred that death was due to complications of lung cancer. Dr. Naeye is board-certified in anatomic and clinical pathology.

Dr. P. Raphael Caffrey reviewed evidence on April 26, 2000 (EX 2). He considered an accurate employment history and smoking history, medical records from Drs. Villanueva, Rasmussen, and Porterfield, the Plateau Medical Center and Raleigh General Hospital, nine x-ray interpretations from 1981 through 1997, Dr. Koh's pathology report, the death certificate, Dr. Naeye's report, and the pathology slide. Dr. Caffrey found moderate to poorly differentiated non-small cell carcinoma based on the slide. Dr. Caffrey was unable to make the diagnosis of coal workers' pneumoconiosis, but since no autopsy was done, he felt it was possible he had a mild degree of simple coal workers' pneumoconiosis. Because the miner had normal blood gas and pulmonary function studies ten years after leaving coal mining, Dr. Caffrey opined that the miner's work as a coal miner did not cause, contribute, to, or hasten his death. Rather, he

found that death was due to a very malignant carcinoma of the lung caused by smoking. Dr. Caffrey is board-certified in anatomic and clinical pathology.

Dr. Stephen T. Bush reviewed medical evidence on May 10, 2000 (EX 3). He reviewed all the evidence noted by Dr. Caffrey and Dr. Caffrey's report. He opined that the miner did not have pneumoconiosis and that the disease did not contribute to or hasten his death. Rather, he opined that the miner died as a result of carcinoma of the lung with metastases to the lymph nodes and ribs. He added that the miner suffered no chronic respiratory impairment prior to death. His weakness just prior to death was due to complications of chemotherapy. Dr. Bush is board-certified in clinical and anatomic pathology as well as medical microbiology.

Dr. Gregory J. Fino reviewed the medical evidence on June 13, 2000 (EX 4). He reviewed all the medical evidence of record to date, including the reports of Drs. Naeye, Caffrey, and Bush, as well as all the reported coal mine employment and smoking histories. He concluded that the objective evidence was insufficient to justify a diagnosis of simple coal workers' pneumoconiosis. He opined that the miner did not suffer from an occupationally acquired pulmonary condition and found no respiratory impairment. Dr. Fino opined that the miner died as a result of lung cancer and added that coal mine dust inhalation neither caused, contributed to, nor hastened his death. He added that the miner would have died as and when he did even if he had never stepped foot in a mine. Dr. Fino is board-certified in internal medicine and pulmonary disease.

Dr. James R. Castle reviewed the medical evidence on June 15, 2000 (Ex 5). He reviewed all the medical evidence to date except for Dr. Fino's report. He concluded that the miner did not suffer from coal workers' pneumoconiosis. He also opined that the miner did not have any significant pulmonary impairment during his life that was related to coal mine employment. Dr. Castle opined that the miner died because of lung cancer which was not related to coal mine employment or coal dust exposure, and that the death was neither caused by, contributed to by, nor hastened in any way by coal mine employment. Dr. Castle added that the miner would have died as and when he did even if he had never worked as a coal miner. He attributed the cancer to smoking. Dr. Castle is board-certified in internal medicine and pulmonary disease.

Dr. Erica C. Crouch reviewed medical evidence on June 19, 2000 (EX 6). She considered the glass slide containing lung tissue from the needle-guided biopsy and the corresponding surgical pathology report, miscellaneous medical records, and occupational records. She also reviewed the reports of Drs. Caffrey, Bush, and Naeye. She found non-small cell carcinoma of the lung and opined that the materials were insufficient to establish or refute a diagnosis of pneumoconiosis. She pointed out that the medical records provided no compelling radiographic or clinical evidence of pneumoconiosis. Dr. Crouch opined that any respiratory impairment prior to death was most likely attributable to lung cancer. Thus, she found no evidence to indicate that coal dust exposure contributed to or hastened the miner's death. Dr. Crouch is board-certified in anatomic pathology.

Conclusions of Law and Discussion

Existence of Pneumoconiosis

Section 718.202(a) provides four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§718.304, 718.305, and 718.306; or (4) the findings by a physician of pneumoconiosis as defined in § 718.201 which is based upon objective evidence and a reasoned medical opinion.

There are thirteen x-ray readings in evidence based on eight x-rays. Eleven readings were by B-readers, and ten of those B-readers are also board-certified radiologists. *See Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-309 (1984). Only one x-ray even mentioned the possibility of pneumoconiosis. Dr. Lee felt the December 5, 1997 x-ray may have shown minimal black lung. However, the later film taken February 2, 1998 and read by Dr. Lee did not note the possibility of the disease. Because the only mention of pneumoconiosis is stated in terms of possibility, the most recent film did not find pneumoconiosis, and the overwhelming weight of the evidence by the best-qualified readers is unanimously negative, this tribunal finds that the x-ray evidence does not establish the existence of pneumoconiosis under §718.202(a)(1).

Under §718.202(a)(2), a biopsy or autopsy conducted and reported in compliance with §718.106 may be the basis for a finding of the existence of pneumoconiosis. In this case, a needle-guided biopsy of lung tissue was conducted on February 5, 1998. Dr. Koh diagnosed non-small cell bronchogenic carcinoma. Drs. Naeye, Caffrey, Bush, Fino, Castle, and Crouch concurred in that finding. None of these physicians found pneumoconiosis, although Drs. Caffrey, Castle, and Crouch pointed out that the sample was insufficient to rule in or rule out that diagnosis. Given the unanimity of opinion, this tribunal finds that the biopsy evidence fails to establish the existence of pneumoconiosis.

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in §§718.304, 718.305, or 718.306 are applicable. Since there is no x-ray evidence of complicated pneumoconiosis in the record, § 718.304 does not apply. Section 718.305 is inapplicable because the claim was filed after January 1, 1982. Section 718.306 is not relevant since it is to be used in connection with the claims of miners who died before 1978.

Pursuant to § 718.202(a)(4), reasoned medical opinions can also establish the existence of pneumoconiosis. None of the examining or reviewing physicians diagnosed pneumoconiosis. No mention of the presence or absence of the disease was made by Drs. Porterfield or Larson, or by physicians at the Plateau Medical Center or the Fayette Clinic. Drs. Villanueva, Naeye, Bush, Fino, Castle, and Crouch specifically did not find pneumoconiosis. Dr. Rasmussen could not exclude pneumoconiosis, opining that the x-ray changes were suggestive, but not diagnostic, of the disease. Similarly, Dr. Caffrey opined that it was possible the miner had a mild degree of simple coal workers' pneumoconiosis since no autopsy was done to rule out the disease, but none of the evidence he reviewed revealed the presence of the disease.

I find the opinions of Drs. Rasmussen and Caffrey—to the extent they might support a finding of coal workers’ pneumoconiosis—too equivocal to be credited. They are not stated in terms of reasoned medical probability and are simply too indefinite to be credited. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The opinions of Drs. Naeye, Bush, Fino, Castle, and Crouch are well documented and based on a review of the medical evidence, which has provided them with a broad base from which to draw their conclusions. *See Perry v. Director, OWCP*, 9 BLR 1-1 (1986). These five physicians also maintain superior qualifications in either pathology or pulmonary disease, and this tribunal, therefore, defers to their opinions. *See Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Dr. Villanueva’s opinion also persuades this tribunal because it is well documented and supported by the objective medical evidence. The x-ray on which she relied was confirmed as negative by Dr. Wheeler, a B-reader and board-certified radiologist. Accordingly, this tribunal finds that the medical opinion evidence does not support a finding of pneumoconiosis.

Upon consideration of all the evidence under §718.202, this tribunal finds that Claimant has failed to establish that the miner suffered from coal workers’ pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.2d 22, 24-25 (3d Cir. 1997).

Causation

In addition to establishing the presence of pneumoconiosis, a claimant must also establish that the miner’s pneumoconiosis arose, at least in part, out of his coal mine employment. Pursuant to §718.203(b), a claimant is entitled to a rebuttable presumption of a causal relationship between pneumoconiosis and the miner’s coal mine employment if the miner worked for at least ten years as a coal miner. In the instant case, Claimant established eighteen years and four months of qualifying coal mine employment. Thus, had Claimant established the existence of pneumoconiosis, she would have also been entitled to invoke the rebuttable presumption that the miner’s pneumoconiosis arose from his coal mine employment under the provisions of §718.203(b). However, because she has not established the existence of pneumoconiosis, the issue is moot.

Death Due to Pneumoconiosis

Since this claim involves a survivor's claim filed after June 30, 1982, benefits are payable only if the miner's death was due to pneumoconiosis if any of the following criteria are satisfied:

1. Where competent medical evidence established that pneumoconiosis was the cause of the miner’s death, or
2. Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

3. Where the presumption set forth at Section 718.304 is applicable.

4. However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

§ 718.205(c). Pneumoconiosis is a “substantially contributing cause” of a miner’s death if it hastens the miner’s death. §718.205(c)(5).

Dr. Larson, who signed the death certificate, listed the cause of death as respiratory failure due to non-small cell lung cancer, pulmonary embolism, pneumonitis, and chronic obstructive lung disease. He also listed hypercalcemia, malignant versus hyperparathyroid, as another significant condition contributing to death, but not resulting in the underlying cause of death. Drs. Naeye, Caffrey, Bush, Fino, Castle, and Crouch opined that pneumoconiosis did not cause, contribute to, or hasten the miner’s death. They attributed his death to lung cancer.

Thus, none of the evidence supports any link between the miner’s death and coal workers’ pneumoconiosis. Dr. Larson’s opinion is convincing because he attended the miner during his last two hospital visits and was, thus, very well familiar with his final condition. *See Schaaf v. Matthews*, 574 F.2d 157, 160 (3d Cir. 1978). He also based his determination on accurate smoking and employment histories, as well as physical examinations and objective laboratory data, which qualifies his opinion as well reasoned. *See Perry*, 9 BLR 1-1. The opinions of Drs. Naeye, Caffrey, Bush, Fino, Castle, and Crouch are convincing for the reasons stated above. For these reasons, and because the opinion is unanimous, this tribunal concludes that Claimant has failed to establish that her husband's death was due to or substantially contributed to by pneumoconiosis, and that her claim for benefits must be denied.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for representation services rendered to her in pursuit of her claim.

ORDER

The claim of Margaret Wriston for black lung benefits under the Act is hereby denied.

A
EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the **Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of this notice must also be served on Donald S. Shire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.